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No. 295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GERTRUDE WELCH MORRIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

VERNA D. MORRIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

HENRY CARL MORRIS, and
FREDERICK WILLIAM MORRIS, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Gertrude Welch Morris, Verna D. Morris, Henry Carl Morris and Frederick William Morris pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above captioned cases on May 31, 1962.

OPINIONS BELOW

The opinion of the District Court is not reported. It is contained in the appendix record printed for the Court of Appeals, filed herewith, pursuant to Rule 21, at page 22a. The opinion of the Circuit Court of Appeals is not yet reported in the official reporter. It is appended hereto.

JURISDICTION

The judgments of the Circuit Court of Appeals are dated and were entered on May 31, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Does Title 28, § 2463, U. S. C. confer jurisdiction on the District Courts in plenary actions by nontaxpayers against the United States to quiet title to the proceeds of life insurance detained by the insurer pursuant to notices of Internal Revenue liens and levy.

STATUTE INVOLVED

The statute involved is 62 Stats. 974, 28 U.S.C. § 2463 which provides:

> "§ 2463. Property taken under revenue laws not repleviable.
>
> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

STATEMENT OF THE CASE

The separate complaints allege, in substance, that the Massachusetts Mutual Life Insurance Company, a Massa-

chusetts corporation, issued several policies of insurance on the life of G. Frederick Morris, the now deceased tax payer, who was a resident of Michigan. The District Director of Internal Revenue filed several notices of tax lien against the insured, commencing August 20, 1957, and, thereafter, served notice of liens and levy on the insurer on May 18, 1960.

Pursuant to the terms of a decree of divorce, entered in 1941, the deceased taxpayer was required to maintain several policies of life insurance issued by the Northwestern Mutual Life Insurance Company, a Wisconsin corporation, and a deferred survivorship annuity issued by the Massachusetts Mutual Life Insurance Company for the benefit of his former wife, plaintiff and petitioner, Gertrude Welch Morris. He retained an interest in said policies in the event his former wife predeceased him. By the terms of said decree, he was enjoined from changing the beneficiary and from borrowing against said policies without the permission of the court. He obtained permission of the Court, on March 6, 1957, to borrow $5,000 on the security of said Northwestern policies from the National Bank of Detroit and, in connection therewith, was required to indemnify the plaintiff, Gertrude Welch Morris, against loss by maintaining an additional $5,000 policy of life insurance with the Massachusetts Mutual in which she is the named beneficiary, being the life insurance policy referred to in the Complaint in the first action. Said loan remains unpaid in its entirety.

Verna D. Morris, the plaintiff in the second case, and Henry Carl Morris, and Frederick William Morris, the plaintiffs in the third case, are, respectively, the beneficiary and the joint beneficiaries of the other policies of life insur-

ance issued by the Massachusetts Mutual, involved herein.

Prior to the filing of notice of any tax lien against the insured, he pledged the policies involved in the second and third cases to the National Bank of Detroit to secure a loan in excess of the cash surrender value of said policies. Subsequent to the filing of notice of said tax liens, the insured borrowed from the company the cash surrender value of said policies, the proceeds of which were paid to the National Bank of Detroit in reduction of its loan to the insured. Thereafter, the Massachusetts Mutual made automatic premium loans in accordance with the terms of said policies, to keep said policies in effect. It also made an automatic premium loan on the policy payable to the plaintiff in the first case.

The Massachusetts Mutual had no actual knowledge of said tax liens until it was served with notice of lien and levy on May 18, 1960. It made no further loans after receipt of such notice. The insured died June 19, 1960.

Pursuant to the statutes of the State of Michigan, 17a M.S.A. Sec. 24.12207(2), the proceeds of life insurance are exempt from the claims of creditors, except to the extent of transfers made or premiums paid in fraud of creditors.

The Massachusetts Mutual has, pursuant to notice of said liens and levy, detained the entire proceeds of said policies.

The petitioners, after the death of the insured taxpayer, made application to the Bureau of Internal Revenue for release of the levy on the respective policies of insurance; the plaintiffs in the second and third actions offering to pay the net cash value of said policies as of the date of the insured's death, pursuant to the decisions in *Comm* v. *Stern*, 357 U.S. 39 and *Bess* v. *U.S.*, 357 U.S. 51. The applications were denied.

No action having been taken for more than a year to foreclose said tax liens, the petitioners filed plenary actions against the United States in the District Court for the District of Massachusetts, that being the district in which the property was detained, to quiet title to the proceeds of said policies as against the tax liens and levy of the United States. Jurisdiction was asserted under 28 U.S.C. § 2463. It was and is the position of the petitioners that where jurisdiction otherwise exists, the sovereign immunity of the United States is waived by 28 U.S.C. § 2410, which provides as follows:

> "(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien."

This statute is given a broad construction to include actions to remove a cloud on title. *U.S.* v. *Coson*, 286 F. 2d 453.

The Complaint in the first action alleges that the interest of the plaintiff in said policies, pursuant to said decree of divorce, is prior in time and superior to the tax liens of the United States. The prayer of the Complaint is:

> "that a decree be entered herein adjudging and decreeing that the interest of the plaintiff in said policies of insurance issued by the Massachusetts Mutual Life Insurance Company is superior to said tax liens of the United States against G. Frederick Morris and discharging the proceeds of Policy No. 2

499 852 issued by Massachusetts Mutual Life Insurance Company from said Federal tax liens and levy."

The complaints in the second and third cases are to remove a cloud from title.

The prayer of the Complaints in these actions are as follows:

> "that this Court determine the amount of the proceeds of said policies of insurance to which said Federal tax lien and levy has attached and, upon payment thereof by the plaintiffs to the Clerk of this Court, that the proceeds of said policies of insurance be decreed to be released and discharged from said Federal tax lien and levy."

The Massachusetts Mutual Life Insurance Company was not named a party defendant in the actions for the reason that the plaintiffs have no dispute with it, but seek only to quiet title to the proceeds of insurance to which they are the named beneficiaries, as against the tax liens of the United States.

The United States was duly served with summons, appeared by the District Attorney, and filed identical motions to dismiss,

> "for lack of jurisdiction; the defendant, the United States of America, not having waived its immunity by virtue of any of the statutes cited in the plaintiff's complaint and the plaintiff on the face of his complaint having failed to comply with 26 U.S.C., Section 7424."

The trial court granted the motions to dismiss for the following reasons:

> "The three motions to dismiss in these cases brought by Gertrude Welch Morris, Verna D. Morris, Henry Carl Morris and Frederick William Morris, the last two suing jointly, are granted. In each case

the complaint purports to find jurisdiction in 28 United States Code, Section 2463, and nowhere else. Jurisdiction is not conferred upon these complaints by that Section. See *New Hampshire Fire Insurance Company* v. *Scanlon* 362 U.S. 404. Moreover, a fair examination of the complaints shows that they are in fact attempts to secure a declaratory judgment in violation of 28 United States Code, Section 2201. See *Wilson* v. *Wilson*, 141 F. 2d 599 (4th Circuit), and *Martin* v. *Andrews*, 238 F. 2d 552 (10th Circuit)."

On the argument of these causes in the Court of Appeals, counsel for the Government conceded that the actions were not attempts to secure declaratory judgments within the provisions of 28 U.S.C. 2201. It was the contention of counsel for the Government, both in the trial court and in the Court of Appeals, that jurisdiction was not conferred by Section 2463 and, therefore, the sovereign immunity of the United States was not waived by Section 2410. Counsel for the petitioners agrees that Section 2410 is not a waiver of the sovereign immunity unless jurisdiction exists independent of that statute. The Court of Appeals held that, under authority of this Court's decision in *New Hampshire Fire Insurance Company* v. *Scanlon*, 1960, 362 U.S. 404, Section 2463 does not confer jurisdiction in these actions.

REASONS FOR GRANTING THE WRIT

1. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THE COURTS OF APPEALS FOR THE THIRD AND NINTH CIRCUITS.

The decision of the Court of Appeals conflicts directly with the decision of the Ninth Circuit Court of Appeals in the case of *Seattle Association of Creditmen* v. *United*

States, 240 F. 2d 906, and with the decisions of the Third Circuit Court of Appeals, in *Raffaele* v. *Granger*, 196 F. 2d 620 and *Rothensies* v. *Ullman*, 1910 F. 2d 590.

In both of the Third Circuit cases, warrants of distraint improperly issued by Federal tax officials and impounding bank deposits of a nontaxpayer were quashed in summary proceedings upon petition of the owner of the affected property. In both cases, the Court of Appeals for the Third Circuit affirmed the District Courts.

The Court of Appeals for the Second Circuit, in *New Hampshire Fire Insurance Company* v. *Scanlon*, supra, affirmed the decision of the District Court, which held that Section 2463 did not confer jurisdiction in summary proceedings. This Court granted certiorari because of the conflict with the decisions of the Third Circuit and sustained the holding of the Second Circuit that summary proceedings would not lie. This Court was not called upon to decide, and did not decide in that case, any issue other than whether or not summary proceedings would lie.

The Court of Appeals for the First Circuit has extended this Court's decision, in *New Hampshire Fire Insurance Company* v. *Scanlon*, supra, and has held that Section 2463 does not grant jurisdiction in these cases, whether summary or otherwise. This is directly contrary to the holding of the Court of Appeals for the Ninth Circuit in the case of *Seattle Association of Creditmen* v. *United States*, supra.

In that case, the plaintiff instituted an action to quiet title to funds detained pursuant to Internal Revenue liens and levy against a taxpayer other than the plaintiff. The Court of Appeals held that,

> "The levies in question were made pursuant to the authority conferred upon the district director by 26 U.S.C.A. § 6331 (formerly 26 U.S.C.A. (I.R.C. 1939) § 3690), which is a revenue law of the United States. There is no doubt that the funds affected by these levies have been 'detained.' One who is in possession of property upon which a levy has been made must hold it (except in certain cases not here relevant) subject to the demand of the district director. 26 U.S.C.A. § 6332. The court of the United States having 'jurisdiction' of such property is the district court serving the geographical area wherein the property is situated. *Raffaele* v. *Granger*, (3 Cir.) 196 Fed. (2d) 620 [52-1 USTC ¶ 9321]. The funds here in question are situated within the geographical area served by the district court in which this action was instituted. It therefore appears that all of the requirements of 28 U.S.C.A. § 2463 have been met in this case, and that the district court wherein this suit was begun had jurisdiction to entertain this suit."

In the instant cases, the Court of Appeals for the First Circuit attempted to distinguish the Seattle Association case on the grounds that the plaintiff was the party in actual possession. (In the footnote to its opinion, it recognized that some of the funds were in the custody of a bank, but that the Court did not discuss that distinction.) This attempted distinction is purely superficial. Actions to quiet title usually pertain to real property. If the defendant is in possession, the plaintiff may not maintain the action, which is equitable in character, because he has an adequate remedy at law in ejectment, and the defendant would have the right to a jury trial. This rule has no application where the defendant is not in possession. Specifically, it has no proper application to the complaints in the instant actions.

Nor, does the fact that the Massachusetts Mutual Life Insurance Company was not made a party defendant have any significance. It could have been brought in under the Rule of Civil Procedure if it was a necessary party. The plaintiffs, as the named beneficiaries in the policies, certainly have a property interest which they have a right to protect and to which they have a right to quiet title against the liens and levy of the United States.

The decisions of the Courts of Appeals for the Third and the Ninth Circuits are clearly in conflict with the decision of the Court of Appeals for the First Circuit in the instant cases. Its decision is not supported by the decision of this Court in the case of *New Hampshire Fire Insurance Company v. Scanlon*, on which both the District Judge and the Court of Appeals relied. We respectfully submit that the decision of the court below is erroneous.

2. THE QUESTION INVOLVED IS ONE OF CONSIDERABLE PUBLIC IMPORTANCE.

The petitioners, and any other party, whose funds are detained pursuant to an Internal Revenue lien and levy against another, is without a remedy unless Section 2463 grants jurisdiction to quiet title as against the lien of the United States. In view of the ever increasing number of notices of lien filed and levies served on banks and insurance companies, as evidenced by the numerous recent court decisions, the question of jurisdiction involved herein is one of considerable importance.

Title 28, Section 1340, which grants jurisdiction to the District Courts in civil actions arising "under any Act of Congress providing for internal revenue * * *," is not

applicable because the validity of the tax liens and of the levy in the cases at bar, as well as in the cases above cited, is not disputed and, consequently, the case is not one arising under any Act of Congress.

The observation of the Court of Appeals that an action could be had "for recovery on the indebtedness" (presumably against the Massachusetts Mutual) is, to say the least, naive. How can any court determine the extent of the proceeds of insurance to which the tax lien attached without the United States being before the court to assert any claim it may have with reference to the priority of its lien or with reference to any claim for recovery of transfers made or premiums paid in fraud of creditors, under applicable state statutes? Certainly, the insurance company should not be expected to carry such a burden. And, it is well-settled that the United States could not be impleaded in such an action as it has not waived its sovereign immunity in an action under the Federal Interpleader Statute.

As pointed out in the brief of the Solicitor General filed in the case of *New Hampshire Fire Insurance Company* v. *Scanlon*, supra, Section 2463 was derived from the Act of March 2, 1833, which was the Federal Government's answer to the ordinance of nullification adopted by South Carolina in an attempt to prevent collection of custom duties in that state.

The Act of March 2, 1833, contained comprehensive provisions, including among others, (Section 5) "extending Federal jurisdiction to all cases arising under the revenue laws . . . ." We again quote the Solicitor General:

> "With the possible exception of the withdrawal of the remedy of replevin, even in the Federal courts,

> the act was concerned only with the exclusion of the state courts and the expansion of the jurisdiction of the Federal courts in revenue matters * * *."

As it seemed necessary in 1833 to curb the abuses of state courts in interfering with collection of Federal revenues, it is currently equally essential that nontaxpayers have protection, through recourse to the Federal courts, against the excesses of over-zealous revenue agents. Congress has recognized this necessity and has acted in respect thereto. Section 2463, while it may have been derived from the Act of March 2, 1833, was adopted, in its present form, in 1948. It expressly deprives a party whose property has been sequestered by liens and levies or distraint under the revenue laws, of the summary remedy of replevin and from any proceeding in the state court, which he would otherwise have, by placing the property in the custody of the law. But, it also confers jurisdiction on the courts of the United States by making the property subject to the orders and decrees of the courts of the United States having jurisdiction thereof.

We do not comprehend what the Court of Appeals meant when it said,

> "The statute (Section 2463) did not place levied property in the custody of the Federal courts for general adjudicatory purposes, whether summary or otherwise."

The petitioners do not claim that the property detained is in the "custody of the court." The statute specifically states that it is in the "custody of the law." It further states that it is subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. Certainly, this is a conferral of jurisdiction on the District Court

where the property is detained. We agree with the position of the Solicitor General and the decision of this Court, in *New Hampshire Fire Insurance Company* v. *Scanlon*, supra, that the statute does not attempt to prescribe the procedure to be followed in invoking the jurisdiction of the court and that the policy underlying the Federal rules requires a plenary action and not summary proceedings to invoke that jurisdiction. We have instituted plenary actions.

We respectfully urge that whether or not a party, other than the taxpayer, whose property has been detained pursuant to an Internal Revenue lien, has a remedy against the United States, is an urgent question and one of considerable public importance. It would be most unfair if taxpayers whose property is detained in the jurisdiction of the Third and Ninth Circuit Courts of Appeals have such a remedy, whereas taxpayers whose property is detained in the First Circuit are without a remedy. The decision of the Court of Appeals for the First Circuit is erroneous.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted,

FRANCIS W. McCAULEY,
Counsel for Petitioners

Dated: July 27, 1962.

APPENDIX

1. OPINION OF THE COURT OF APPEALS

May 31, 1962

ALDRICH, Circuit Judge. Now deceased taxpayer, a resident of Michigan, was insured under several policies of life insurance issued by Massachusetts Mutual Insurance Co., a Massachusetts corporation. By a divorce decree he was required to maintain one policy in force for the benefit of his former wife, but with the right to borrow against it. His other policies named his mother and sons, respectively, as revocable beneficiaries. Taxpayer assigned all of these policies to a Michigan bank to secure a loan. Subsequently the local district director of Internal Revenue filed tax liens against taxpayer. When the bank learned of this it made certain demands upon taxpayer, as a result of which he obtained maximum policy loans from the company, which allegedly had no notice of the liens. With the proceeds he made required premium payments and discharged the bank loan. Thereafter the policies were maintained in force by automatic premium loans until notices of liens and levy were served upon the company. Following taxpayer's death, which occurred shortly afterwards, the beneficiaries made demand upon the insurance company. The divorced wife sought the net proceeds of her policy. The others requested the net proceeds of their policies less the cash surrender value at the date of death. *Cf. United States* v. *Bess*, 1958, 357 U. S. 51. The company replied that since the levy exceeded the total net proceeds it could make no payment. The beneficiaries then requested the government to recognize their claims and after the government failed to take action brought the present three suits against it as sole defendant. Jurisdiction was asserted under 28 U.S.C.

§ 2463.[1] On the government's motions to dismiss, the district court agreed that it lacked jurisdiction and held, in addition, that the complaints attempted to secure declaratory judgments in violation of 28 U.S.C. § 2201. Plaintiffs appeal.

It seems to us that plaintiffs have chosen to approach this matter in the most difficult manner. Their legal claim is against the insurance company, but they have not sued it. Their asserted reason is that "no dispute" exists between them. However, in the company's absence how is this to be determined? Plaintiffs liken their suit to an action to quiet title. Even without considering the possible issue of premium payments in fraud of creditors, in no sense is the title fully before the court in the absence of the debtor on whom the levy was made. In plaintiffs' case of *Seattle Ass'n of Credit Men* v. *United States*, 9 Cir., 1957, *240 F. 2d 906*, the plaintiff, as an assignee for the benefit of taxpayer's creditors, was levied upon for taxpayer's unpaid taxes. The court held that section 2463 conferred jurisdiction for its suit to quiet title, and that 28 U.S.C. § 2410(a), while admittedly not jurisdictional, constituted the government's consent. But there plaintiff was the party in actual possession.[2]

Furthermore, any consideration of *Seattle Ass'n* must be subject to *New Hampshire Fire Ins. Co.* v. *Scanlon*, 1960 362 U. S. 404. There the government served notices of levy upon the city of New York, an alleged debtor of a delinquent

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[1] 28 U.S.C. § 2463. "All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

[2] It is true that some of the funds were in the custody of a bank. The court did not discuss that distinction. We do not think even this corresponded with plaintiffs' claims against the insurance company here. It is one thing to quiet title to assets temporarily entrusted to a bank. It is another, to funds one has never realized.

taxpayer. The plaintiff, claiming that as a surety its claim against the city was paramount, brought a summary proceeding against the district director, the city and the taxpayer to quash the notices of levy. The district court's dismissal was, in due course, affirmed by the Supreme Court. Plaintiffs point out that that court, agreeing with the district court that a plenary suit might readily have been brought, emphasized an antipathy to summary actions, and that they have brought plenary suits. They overlook, however, the fact that the district court did not suggest a plenary suit against the government, but, as the Supreme Court pointed out, "for recovery on the indebtedness."

Plaintiffs also overlook the other aspect of the *Scanlon* decision. The Supreme Court discussed the history of section 2463 as being specially concerned with curbing state claims. We believe the opinion strongly indicated, in the light of this history, that the statute did not place levied property in the custody of the federal courts for general adjudicatory purposes, whether summary or otherwise. It is true that the court made no mention of a line of lower court cases, commencing with *Long* v. *Rasmussen*, D.C. Mont., 1922, 281 Fed. 236, seemingly *contra*. However, we have no reason to suppose that its remarks were inadvertent.

The district court correctly dismissed the complaints. Nothing that we have said here is to be taken as adjudicating what other remedies plaintiffs may pursue. We merely determine they may not have this one.

Judgments will be entered affirming the judgment of the District Court.

2. Title 26 U.S.C., § 7424 provides:

Sec. 7424. CIVIL ACTION TO CLEAR TITLE TO PROPERTY

(a) Obtaining leave to file.—

(1) Request for institution of proceedings by United States. Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in the jurisdiction in which the property is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) Petition to court. If the Secretary or his delegate fails to authorize the filing of such civil action within 6 months after receipt of such written request, such person or purchaser may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) Court order. After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) Adjudication. Upon the filing of such civil action, the district court shall proceed to adjudicate

the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) Costs. All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 877.

3. Title 28 U.S.C. § 1340 provides:

Sec. 1340. INTERNAL REVENUE; CUSTOMS DUTIES

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court. June 25, 1948, c. 646, 62 Stat. 932.

4. Title 28 U.S.C. § 2410 provides in part:

Sec. 2410. ACTION AFFECTING PROPERTY ON WHICH UNITED STATES HAS LIEN

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow. As amended July 7, 1958, Pub. L. 85-508, § 12(h), 72 Stat. 348; June 11, 1960, Pub. L. 86-507, § 1(20) 74 Stat. 201.

5. Title 28 U.S.C. 2463 provides:

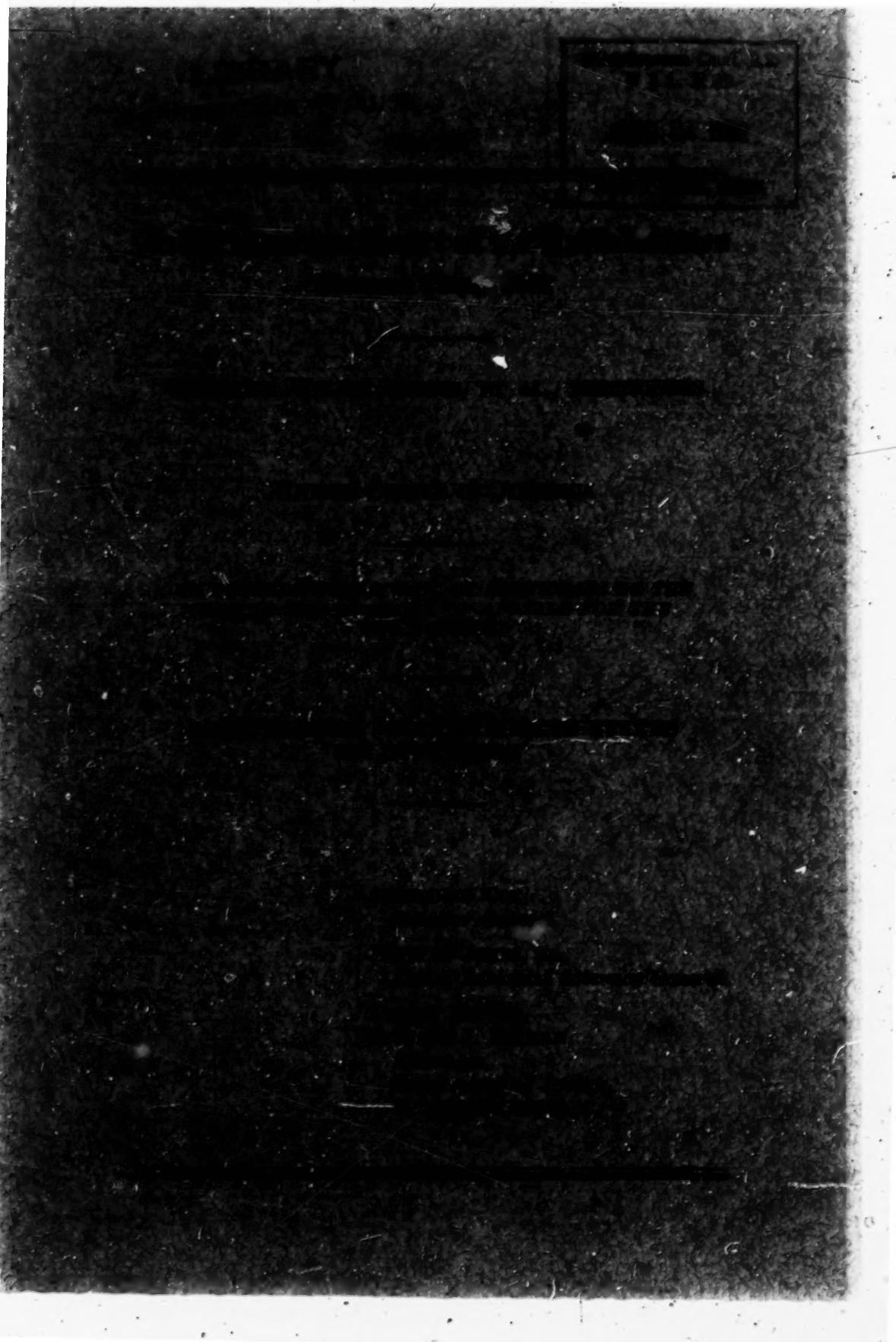
Sec. 2463. PROPERTY TAKEN UNDER REVENUE LAW NOT REPLEVIABLE

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. June 25, 1948, c. 646, 62 Stat. 974.

6. 17a Mich. Stat. Anno. Sec. 24.12207 provides in part:

(2) If a policy of insurance, or contract of annuity (whether heretofore or hereafter issued) is effected by any

person on his own life or on another life in favor of a person other than himself, or (except in cases of transfer with intent to defraud creditors) if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof (other than the insured or the person so effecting such insurance, or his executors or administrators) shall be entitled to the proceeds and avails (including the cash value thereof) against the creditors and representatives of the insured and of the person effecting the same, (whether or not the right to change the beneficiary is reserved or permitted and whether or not the policy is made payable in the event that the beneficiary or assignee shall predecease such person, to the person whose life is insured or the person effecting the insurance): Provided, That, subject to the statute of limitations, the amount of any premiums for said insurance paid with intent to defraud creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy: Provided further, That proof that such transfer was made and a particular debt or claim existed at the time of such transfer shall be prima facie evidence of intent to defraud said creditor as to said debt or claim; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless before such payment the company shall have written notice at its home office, by or in behalf of a creditor of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specification of the amount claimed. (C. L. '48, §500.2207).



In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 295

GERTRUDE WELCH MORRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioners claim an interest as beneficiaries, in the proceeds of certain insurance policies being held by the Massachusetts Mutual Life Insurance Company. Asserting that the Director for the District of Detroit, Michigan, had filed a notice of levy upon the insurance company with respect to the proceeds of these policies, petitioners brought the three instant actions in the District Court for the District of Massachusetts for a determination of the

extent of the government's tax lien. The district court ordered a dismissal of the suits (R. 24a),[1] and the court of appeals affirmed (Pet. 14-16).

The insurance company, which is holding the proceeds in question and upon which the government's levy was served, was not made a party to the action. However, the primary dispute alleged in the complaints is between the United States and the insurance company. Thus, in two of the actions, Nos. 5937 and 5938, the petitioners do not themselves dispute the validity and priority of the government's lien, but allege that the insurance company has a lien on the proceeds superior to that of the government. The complaints suggest that the company's lien eliminates the government's tax lien (R. 13a, 18a). In the remaining suit, No. 5936, where petitioners themselves question the validity and priority of the lien, they also allege that a premium loan was made to the assured on the policy to the extent of substantially the entire cash value. Again the suggestion is that the loan wipes out the tax lien (R. 8a, 9a). As the court of appeals said (Pet. 15):

> Their [petitioners'] legal claim is against the insurance company, but they have not sued it. Their asserted reason is that "no dispute" exists between them. However, in the company's absence how is this to be determined?

The insurance company is an indispensable party to each of these proceedings. Without it, no court

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[1] Record references are to the appendix to the petitioners' consolidated brief in the court of appeals.

can render a meaningful judgment. The relief requested by petitioners is with regard to tax enforcement against the insurance company, and it is the company which would be directly affected by any judgment determining the extent of the government's interest. This relief could not be granted because the suits were defective for lack of an indispensable party. Therefore, dismissals were necessary even if the district court otherwise had jurisdiction. *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971 (C.A. 5th); *Emery* v. *Adams*, 179 F. 2d 586 (C.A. 6th); *Mallin* v. *Schaper*, 185 F. 2d 1 (C.A. 7th).[2]

Petitioners' claim that it was error for the district court to dismiss the suits on the ground that 28 U.S.C. 2463 does not confer jurisdiction presents no issue for review here. Even assuming *arguendo* that Section 2463 were held to confer jurisdiction as petitioners claim, the dismissals were properly affirmed by the court of appeals for the lack of the indispensable party. Petitioners make no claim that Section 2463 remedies this flaw. *Cf. New Hampshire Fire Ins. Co.* v. *Scanlon*, 362 U.S. 404. Under the circumstances the instant cases afford no occasion for resolution of any conflicts in the interpretation of Section 2463 which may be found in the decisions of the Third Circuit in *Rothensies* v. *Ullman*, 110 F. 2d

[2] This defect was not urged in the district court, but was raised in the court of appeals. Lack of an indispensable party may be noted for the first time on appeal. *Hoe* v. *Wilson*, 76 U.S. 501; *McShan* v. *Sherrill*, 283 F. 2d 462 (C.A. 9th); *Haby* v. *Stanolind Oil and Gas Co.*, 225 F. 2d 723 (C.A. 5th); *Flynn* v. *Brooks*, 105 F. 2d 766 (C.A. D.C.); Federal Rules of Civil Procedure, Rule 12(b).

590, and *Raffaele* v. *Granger*, 196 F. 2d 620,[3] and the Ninth Circuit in *Seattle Assn. of Credit Men* v. *United States*, 240 F. 2d 906.

Finally, it should be noted that on May 31, 1962, the government instituted a civil action in the District Court for the Eastern District of Michigan[4] to foreclose the tax liens on, among other things, the cash surrender values of the insurance policies here in question. Thus, the petitioners will obtain in that action the relief—the determination of the extent of the government's lien—which they were seeking here.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1962.

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[3] These cases involved summary actions to quash warrants of distraint issued by revenue officials on bank accounts and were expressly overruled by this Court in *New Hampshire Fire Ins. Co.* v. *Scanlon*, *supra*, on the ground that Section 2463 does not authorize summary proceedings.

[4] Civil Action No. 22626.

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No. 38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

[redacted], et al., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY TO
RESPONDENT'S OBJECTIONS TO JURISDICTION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 295

GERTRUDE WELCH MORRIS, et. al., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION

THE INSURANCE COMPANY IS NOT AN INDISPENSABLE PARTY

The petitioners contend that the sole question for review was whether 28 U.S.C. 2463 conferred jurisdiction in these actions.

Counsel for the respondent tacitly admit that Section 2463 does confer jurisdiction, but they seek to justify the decision of the Court of Appeals on the grounds that "the insurance company is an indispensable party to each of these proceedings." This question was not raised in the District Court. Had it been raised, it would have been a simple matter to bring in the Massachusetts Mutual, if necessary or desirable.

Counsel for the Appellee raised the question in their brief in the Court of Appeals. We did not consider that it merited a reply. The Court rationalized (*dehors the record*) and in its opinion stated as a fact:

> "Following the taxpayer's death, which occurred shortly afterwards, the beneficiaries made demand upon the insurance company. The divorced wife sought the net proceeds of her policy. The others requested the net proceeds of their policies less the cash surrender value at the date of death. *Cf. United States v. Bess*, 1958, 357 U.S. 51. *The company replied that since the levy exceeded the total net proceeds it could make no payment.*" (Italics supplied).

The court concluded:

> "Their legal claim is against the insurance company, but they have not sued it. Their asserted reason is that 'no dispute' exists between them. However, in the company's absence, how is this to be determined?"

The record contradicts the court's apparent rationalization. The complaints show that the amount of insurance in-

volved in the three actions is $130,000.00 plus postmortem adjustments (R. 7a, 11a, 16a). The policy loans ($34,992.95) and the premium loans total $50,754.86 (R. 13a, 18a, 19a) plus a premium loan in an undisclosed amount on the $5,000 policy involved in the first action (R. 8a). The net proceeds, therefore, would be approximately $80,000. The amount of the tax lien filed prior to the policy loans was $55,019.70 (R. 8a). (Other liens in undisclosed amounts were filed in subsequent years.) The total net cash value of the policies at the date of death was only $558.79 (R. 9a, 14a, 18a). Nevertheless, the personal funds of the insurance company, as distinguished from the proceeds of the policies, are not in jeopardy.

What constitutes an indispensable party is defined in *Keegan v. Hubbel Oil and Refining Company*, 155 F. 2d 971, wherein the court said:

> "We are of the opinion that parties are indispensable when their interest in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that their interest would be directly affected by the decree."

Whether or not the insurance company is an indispensable party must be determined from an examination of the facts of the case and the relief sought. *Stafford v. Haskell*, 147 F. Supp. 509. An analysis of the facts will disclose that the interest of the insurance company would not be affected by the decree and that it is not a necessary, much less an indispensable party.

The complaints in these cases disclose:

1. That the plaintiffs are the named beneficiaries in the policies of insurance in question.

2. That the United States recorded a valid tax lien against the insured in his lifetime.

3. That subsequent to the filing of the tax lien, but before the insurance company had actual notice thereof, it made policy loans and premium loans to the extent of substantially the entire cash value of the policies.

4. That the policies matured on the death of the insured.

5. That the insurance company has withheld the entire proceeds of the policies in question pursuant to the notice of the tax lien and levy (R. 9a, 14a, 19a).

6. The relief sought by the petitioner in the first action is to have her interest in the policy, which she obtained pursuant to a decree of divorce, as amended, decreed to be prior in time and superior to the tax lien of the United States (R. 10a).

7. The relief sought by the petitioners in the other two actions is to obtain a judicial determination of the extent of the proceeds of said policies to which the tax lien and levy had attached so that they could pay the same and have the proceeds of the policies discharged from the tax lien and levy (R. 14a, 20a).

The only other pleading filed was the defendant's motion to dismiss directed to the jurisdiction of the court (R. 21a).

This Court, in *U.S. v. Bess*, 357 U.S. 51, held that the cash value of life insurance was an asset of the insured to which

a Federal tax lien would attach. This Court, in the case of *Commissioner* v. *Stern*, 357 U.S. 39, also held that the proceeds of life insurance in excess of the cash value payable to a named beneficiary could not be subjected to the payment of Federal taxes assessed against the insured unless they were subject by state law to the claims of creditors. The statutes of Michigan, where the insured resided, exempt such proceeds except to the extent of transfers made or premiums paid in fraud of creditors.

The petitioners, by virtue of being the named beneficiaries, are entitled, in accordance with the contracts, to the face amount of the policies, less any policy loans, and premium loans made to the insured in his lifetime and less the amount of the proceeds to which the Federal tax lien attached. This latter amount is what is sought to be determined in these actions. Is it the cash value of $558.70, or is it that sum plus the amount of any policy and premium loans made after the tax lien was filed, but before notice of the lien and levy were served on the insurer?

The petitioner in the first action alleges facts which, if proven, will constitute her interest in the policy paramount to the interest of her former husband against whose property the respondent has a tax lien. If her interest was paramount to that of the insured and was prior in time to the tax lien and levy of the United States, then it is, as a matter of law, superior to the lien of the United States. The petitioner Gertrude Morris, and only the petitioner Gertrude Morris, and not the insurance company, has a right to obtain a judicial determination to that effect. The interests of the insurance company will not be affected there-

by. In her case, there can be no question of premiums paid in fraud of creditors for the insured paid the premiums pursuant to the divorce decree entered by the Circuit Court for Wayne County, Michigan, in 1941.

The petitioners in the other two actions are seeking to have the amount due the United States, out of the proceeds of their policies, judicially determined so that they may discharge the lien thereon. Neither the petitioners in these actions nor the insurance company are personally liable to the United States for the payment of the tax assessed against the insured. The insurance company is a mere stakeholder which must pay the United States an amount equal to the extent of the proceeds to which the tax lien and levy attached. It has retained the entire proceeds out of which to pay the same, which is more than ample. After such payment, it will remit the balance to the petitioners. Its interest will not be affected by any decree granting the relief sought.

If the insurance company, after the tax lien was filed against the insured, dissipated the cash value, through policy loans, premium loans, or otherwise, and the proceeds remaining in its hands were insufficient to pay the amount due the United States, then, and only in such event, would it be necessary for the United States to seek a judgment or decree against it. This could be done by a third party claim against the insurance company pursuant to the rules of civil procedure. No such situation exists.

CONCLUSION

There is no merit to the contention of counsel for the respondent that the Court of Appeals was justified in affirming the order of dismissal for lack of an indispensable party. The only issue in these cases was whether or not Section 2463 of Title 28 U.S.C. conferred jurisdiction.

The Court of Appeals was obviously influenced by the lack of the insurance company as a party. However, the Court, relying on the recent decision of this Court in *New Hampshire Fire Ins. Co. v. Scandrett*, 362 U.S. 404, based its decision on the question of jurisdiction under Section 2463, concluding that "The District Court correctly dismissed the complaint".

The decision of the Court of Appeals is erroneous and confusing. It conflicts with the decisions of the Court of Appeals for the Third and Ninth Circuits and with the decision of the Second Circuit in the very recent case of *Bullock v. Latham, Comm. of Int. Rev.* (decided July 20, and not yet reported). The question of jurisdiction is one of considerable importance. Certiorari should therefore be granted.

Counsel's reference (*dehors the record*) to the tax lien foreclosure action recently commenced by the respondent in the District Court at Detroit, Michigan, is impertinent. It discloses an action in Michigan against a resident of Georgia (R. 11a) to foreclose a lien on a fund held in Massachusetts.

Respectfully submitted,

FRANCIS W. McCAFFREY,
Counsel for Petitioners

Dated: Sept. 10, 1962.